STATE OF MICHIGAN

COURT OF APPEALS

MICHAEL D. GILMORE and DAWN GILMORE, Plaintiffs-Appellees, v SORENSEN GROSS CONSTRUCTION CO., INC., Defendant-Appellant.	UNPUBLISHED March 23, 2006 No. 258033 Wayne Circuit Court LC No. 03-301856-NO

Before: Owens, PJ, and Kelly and Fort Hood, JJ

PER CURIAM.

Defendant appeals by leave granted from an order denying its motion for summary disposition in this construction accident case. We reverse.

The facts in this case are partially undisputed. Plaintiff Michael D. Gilmore (hereinafter "plaintiff") fell while working for a steel erection subcontractor at a building construction site. Defendant was the general contractor. Plaintiff slipped and fell when a joist on which he was walking twisted. Defendant contends that plaintiff fell from approximately 13 feet. Plaintiff contends that he fell from approximately 20 feet.

Defendant first argues that plaintiff's claims based upon the inherently dangerous activity doctrine are barred by *DeShambo v Nielsen*, 471 Mich 27; 684 NW2d 332 (2004). We agree.

A motion made under MCR 2.116(C)(10) tests the factual support for a claim, *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003), and should be granted when there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. *Miller v Purcell*, 246 Mich App 244, 246; 631 NW2d 760 (2001). When the burden of proof at trial would rest on the nonmoving party, the nonmovant may not rest upon mere allegations or denials in the pleadings, but must, by documentary evidence, set forth specific facts showing that there is a genuine issue for trial. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). A genuine issue of material fact exists when the record, drawing all reasonable inferences in favor of the nonmoving party, leaves open an issue on which reasonable minds could differ. *West v GMC*, 469 Mich 177, 183; 665 NW2d 468 (2003).

In *DeShambo*, *supra*, pp 40-41, the Supreme Court held that the inherently dangerous activity exception was limited to third-parties and did not apply to employees of independent contractors injured while performing dangerous work. It is undisputed that plaintiff was an employee of Steel Erectors, Inc., a subcontractor performing the steel erection work on this construction site. Assuming *DeShambo* should be retroactively applied, plaintiff was not a third party, and cannot avail himself of the inherently dangerous activity doctrine. Plaintiff argues that *DeShambo* should be given prospective application only. Defendant argues that *DeShambo* should be given retroactive application because that is the general rule, and because *DeShambo* merely returned the inherently dangerous activity doctrine to the scope of application it had at its inception. We agree with defendant. The threshold question in determining whether a decision should be prospectively applied is "whether the decision clearly established a new principle of law." *Pohusky v City of Allen Park*, 465 Mich 675, 696; 641 NW2d 219 (2002). Although *DeShambo* limited an overextension of the inherently dangerous activity doctrine, it did not clearly establish a new principle of law. Therefore, we decline to limit *DeShambo*'s application.

Defendant next argues that plaintiff's claims based on the retained control doctrine are barred by *Ormsby v Capital Welding*, 471 Mich 45; 684 NW2d 320 (2004). Notably, plaintiff's brief on appeal acknowledges the limited scope of the retained control doctrine by quoting the following passage:

> [T]he "retained control doctrine" is a doctrine subordinate to the "common work area doctrine" and is not itself an exception to the general rule of nonliability. Rather, it simply stands for the proposition that when the *Funk*[1] "common work area doctrine" would apply, and the property owner has sufficiently "retained control" over the construction project, that owner steps into the shoes of the general contractor and is held to the same degree of care as the general contractor. [*Ormsby, supra*, p 49.]

The *Ormsby* Court found that the retained control doctrine did not apply to general contractors. *Ormsby, supra,* p 56. Here, plaintiff does not dispute that defendant was a general contractor and not an owner. Thus, the retained control doctrine is inapplicable, and the trial court erred in failing to dismiss the claims asserted under this doctrine.

Defendant next argues that plaintiff's claims based upon the common work area doctrine are also barred by *Ormsby*, which provides:

> [F]or a general contractor to be held liable under the "common work area doctrine," a plaintiff must show that (1) the defendant . . . failed to take reasonable steps within its supervisory and coordinating authority (2) to guard against readily observable and avoidable dangers (3) that created a high degree of risk to a significant number of work[ers] (4) in a common work area. [*Ormsby, supra*, p 54.]

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[1] *Funk v General Motors Corp*, 392 Mich 91; 220 NW2d 641 (1974), overruled in part on other grounds *Hardy v Monsanto Enviro-Chem Systems, Inc*, 414 Mich 29; 323 NW2d 270 (1982).

The third element, a high degree of risk to a significant number of workers, is not supported by the evidence. There is no evidence that plaintiff was at an extremely high elevation. Rather, plaintiff was at a modest elevation, which does not present a high risk of injury. Further, there is no evidence that a significant number of workers were at risk of falling due to shifting joists. Defendant presented evidence that only plaintiff and his steel erection coworkers were on site at the time of the accident. Although plaintiff argues that defendant had supervisory authority over twenty-one subcontractors, there is no evidence regarding how many of those subcontractors would have workers at risk of falling. Accordingly, plaintiff also fails to satisfy the fourth element required for the common work area doctrine.[2]

Plaintiff argues that defendant remains liable for its own active, personal negligence. We find no merit to this contention. It is axiomatic that to establish a cause of negligence, a plaintiff must establish that the defendant owed the plaintiff a legal duty. *Hughes v PMG Building, Inc,* 227 Mich App 1, 5; 574 NW2d 691 (1997). The party who has the legal duty to maintain workplace safety varies depending on whether employees of a subcontractor are working in isolation from other workers or whether employees of several subcontractors are subject to the same hazard. *Ormsby, supra,* pp 57-58 n 9.

> "In the first instance, each subcontractor is generally held responsible for the safe operation of its part of the work. In the latter case, where a substantial number of employees of multiple subcontractors may be exposed to a risk of danger, economic considerations suggest that placing the ultimate responsibility on the general contractor for job safety in common work areas will 'render it more likely that the various subcontractors . . . will implement or that the general contractor will himself implement the necessary precautions and provide the necessary safety equipment in those areas.'" [*Ormsby, supra,* pp 57-58 n 9, quoting *Hughes, supra,* pp 8-9.]

Because we have determined that the instant situation is analogous to the first instance mentioned, we find that plaintiff's allegations of "primary negligence" fail to state a duty distinct from that which would have been owed under the common work area exception. Thus, plaintiff's claims of primary negligence fail.

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[2] Defendant also argues that this Court's decision in *Ghaffari v Turner Construction Co*, 259 Mich App 608; 676 NW2d 259 (2003) (*Ghaffari I*), reversed and remanded 473 Mich 16; 699 NW2d 687 (2005), bars plaintiff's claims under the open and obvious danger doctrine. As noted, this Court's decision in *Ghaffari I* was reversed by the Supreme Court. *Ghaffari, supra,* p 16 (*Ghaffari II*). The Supreme Court held that the open and obvious doctrine has no application to a claim brought under the common work area doctrine. *Ghaffari II, supra,* p 17. Nevertheless, defendant's argument in this regard is irrelevant because we have determined that plaintiff failed to substantiate a claim under the common work area doctrine.

Reversed.

/s/ Donald S. Owens
/s/ Kirsten Frank Kelly
/s/ Karen M. Fort Hood